91-727

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No. 91-

UNITED STATES SUPREME COURT

October Term 1991

AMALGAMATED CLOTHING AND TEXTILE WORKERS UNION, AFL-CIO, CLC,	)
Petitioner,	)
v.	)
EDWARD C. NICHOLS,	)
Respondent.	)

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF SOUTH CAROLINA

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QUESTION PRESENTED

Does the doctrine of San Diego Bldg. Trades Council v. Garmon, 359 U.S. 236 (1959) preempt application of South Carolina's wage payment law to a hiring refusal claim where the refusal is also arguably an unfair labor practice under the National Labor Relations Act?

PARTIES

The parties to this proceeding are the petititioner (defendant below), Amalgamated Clothing and Textile Workers Union, AFL-CIO, CLC, an unincorporated association, and respondent (plaintiff below) Edward C. Nichols, an individual.

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Petitioner, Amalgamated Clothing and Textile Workers Union, AFL-CIO, CLC ("ACTWU") prays that a writ of certiorari issue to review the judgment and opinion of the Supreme Court of South Carolina entered on August 5, 1991.

OPINIONS BELOW

The decision of the Supreme Court of South Carolina is not yet reported and appears in the appendix at pp. A-1 — A-15.

The opinion of the South Carolina Court of Appeals is unreported and appears in the appendix at pp. A-16 — A-20. The opinion of the Circuit Court for York County is unreported and appears in the appendix at pp. A-21 — A-23.

JURISDICTION

The decision of the Supreme Court of South Carolina was filed on August 5, 1991. This petition is being filed within 90 days of that date. The South Carolina Supreme Court's decision is a final judgment rendered by the highest court of that state in which a decision could be had, and it draws into question the validity of the South Carolina Wage Payment Act, S.C. Code Ann. §§ 41-10-10, et seq., on the ground of its being repugnant to the Constitution and laws of the United States. This Court's jurisdiction is invoked under 28 U.S.C. § 1257(a).

STATUTES AND RULES

U.S. Constitution, Art. VI, Clause 2

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

National Labor Relations Act
29 U.S.C. § 157

> Employees shall have the right to self-organization, to form, join or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection. . . .

National Labor Relations Act
29 U.S.C. § 158(a)(1)

> It shall be an unfair labor practice for an employer--
> (1) to interfere with, restrain or coerce employees in the exercise of the rights guaranteed in Section 157 of this title. . . .

S.C. Code Ann.
§ 41-10-10. Definitions.

As used in this chapter:

(1) "Employer" means every person, firm, partnership, association, corporation, receiver, or other officer of a court of this State, the State or any political subdivision thereof, and any agent or officer of the above classes employing any person in this State.

S.C. Code Ann.
§ 41-10-80. Violations and penalties; civil actions by employees; administrative review of civil penalties.

(C) In case of any failure to pay wages due to an employee as required by § 41-10-40 or 41-10-50 the employee may recover in a civil action an amount equal to three times the full amount of the unpaid wages, plus costs and reasonable attorney's fees as the court may allow.

STATEMENT OF THE CASE

1. ACTWU is an international labor organization headquartered in New York City and comprised of local unions throughout the United States and Canada.

Some of ACTWU's locals operate independently, while others are constituted into joint boards comprising several locals within a geographic region. These subsidiary joint boards are separate "labor organizations" distinct from ACTWU under the Labor Management Reporting and Disclosure Act of 1959, 29 U.S.C. § 402(i). The Catawba Valley Joint Board (the "Joint Board") headquartered in Rock Hill, South Carolina included several ACTWU locals in that immediate area.

ACTWU operates under a written constitution adopted by its membership. The Joint Board operated under its own bylaws and the ACTWU constitution and was headed by a manager elected by delegates from its constituent locals. Under the ACTWU constitution, a joint board's manager is an officer and agent of the subsidiary, not the parent:

> All officers, representatives and organizers of local union or joint board shall be agents only of such local union or joint board and shall not be agents of ACTWU. ACTWU Const., Art. VIII, § 9. [Rec. 123][1]

Likewise, the Joint Board's bylaws denominate the manager as an official of the subsidiary, not the parent:

> The Joint Board shall elect a [manager] who shall also be, serve and act as Financial Secretary-Treasurer. The [manager] shall be an officer of the Joint Board but need not be a Joint Board Delegate to be eligible to hold office. Bylaws of Catawba Valley Joint Board, Art. V, § 1. [Rec. 129]

ACTWU's established practice throughout the United States is that some joint board managers are hired by ACTWU onto its own payroll as employees and are then paid by ACTWU, while others remain

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[1]Citations to material in the Transcript of Record (i.e., appellate record) in the court below is referred to here as "Rec." followed by the page number.

on the payroll of the joint boards where they are elected and are not employed by ACTWU itself. [Rec. 147-148]

2. On August 2, 1986 Respondent Edward C. Nichols ("Nichols") was elected manager of the Joint Board in a hotly contested election against Robert Ross, the incumbent who was preferred by ACTWU's leadership. ACTWU fully recognized Nichols as the duly elected Joint Board manager, but it refused to hire him as an employee on the parent union's payroll. It is undisputed that when Nichols assumed office, he deliberately failed to take a salary from the Joint Board and turned down an offer of wages from the Joint Board's president. [Rec. 52, 59-60] Instead, Nichols sought by a number of means to "set a precedent" [Rec. 61] that anyone who is elected as a joint board manager can deliberately

refuse a salary from his or her joint board and force ACTWU, the parent union, to hire the individual and pay the manager's salary.

3. Nichols first claimed wages from ACTWU by means of an internal union appeal which he ultimately failed to pursue to conclusion. [Rec. 143-46] Nichols thereupon filed an unfair labor practice charge with the National Labor Relations Board ("Board") alleging that ACTWU was his employer and that it had violated the National Labor Relations Act ("Act") by depriving him of wages "as a result of him having engaged in a protected concerted activity." [Rec. 149] The Board advised ACTWU about the precise nature of Nichols' retaliatory refusal to hire claim:

> As I indicated to you, the Charging Party is alleging that [ACTWU], as his Employer, has

> violated the Act by refusing to pay his wages and other benefits as a result of his having engaged in protected, concerted activity. Specifically, he is alleging that as a result of his having won the election for the position of Manager of the Catawba Valley Joint Board, the International has retaliated against him by refusing to make the payment of his wages and benefits. The animus against Nichols is allegedly based upon his having defeated the choice for the position of manager of the International Union. [Rec. 154]

Nichols withdrew his Board charge "because it wasn't getting anywhere" [Rec. 55] and because his lawyer "had advised me not to get no [sic] hopes up about any of these agencies doing anything for us." Ibid.

4. On February 26, 1987, after filing his charge with the Board, Nichols filed this lawsuit in the Circuit Court of York County for wages under the South Carolina Wage Payment Act, S.C. Code Ann.

§ 41-10-10, et seq. (Supp. 1989) The complaint alleged that ACTWU owed wages to plaintiff as an ACTWU employee "by virtue of [his] having been elected manager" of the Joint Board. [Rec. 3] ACTWU answered the complaint by admitting that Nichols was duly elected as Joint Board manager, but denying any obligation to pay him wages because of his election to a position in a subsidiary organization. [Rec. 4-8][2] The answer raised a number of affirmative defenses, including preemption under San Diego Bldg. Trades Council v. Garmon, 359 U.S. 236 (1959). Ibid.

After discovery, ACTWU moved for summary judgment on the ground (among

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[2]ACTWU removed the case to United States District Court for the District of South Carolina on March 27, 1987. The case was remanded to the Circuit Court of York County on May 23, 1988.

others) that Nichols' claims were preempted under Garmon. ACTWU pointed out that Nichols had admitted at his deposition that he had made the "same complaint" [Rec. 54] to the Board that he was making in this lawsuit. On June 9, 1989 the Circuit Court, relying explicitly on Garmon, held that "it is at least 'arguable' that this suit arises under § 7 or § 8 of the [Act]" and granted summary judgment to ACTWU. (A-23)

The South Carolina Court of Appeals affirmed the decision of the Circuit Court on September 24, 1990. It found that Nichols' claim was essentially one of retaliatory refusal to hire or pay and that it "is arguably the kind of unfair labor practice subject to the exclusive jurisdiction of the [Board]." (A-19) The Court of Appeals also found that if Nichols were a Joint Board employee, then

ACTWU would not owe him any wages, and if Nichols were an ACTWU employee, "it is at least arguable that he is not a managerial employee" outside the Board's coverage. (A-20) Nichols' petition for rehearing was denied and he thereafter sought certiorari from the South Carolina Supreme Court.

The South Carolina Supreme Court granted certiorari and, after briefing and oral argument, reversed the decision of the Court of Appeals. The court below held that Nichols' claim that he is an employee of ACTWU posed an issue which is not preempted by the Act "because this matter is a mere peripheral concern of the [Act] and touches interests deeply rooted in local feeling and responsibility." (A-12) The court below also held that the issue of Nichols' employment status "is vital to all causes of

action under S.C. Code § 41-10-10, et seq. and that Congress did not intend to preempt the application of this state law." Ibid. The court said that South Carolina's "interest in compelling employers to pay wages to their employees outweighs any interference with the [Act] or risk of sanctions being imposed upon conduct being protected by the Act which could result from the State being allowed to adjudge whether or not a claimant under § 41-10-10, et seq. is an employee of the party for [sic] whom wages are claimed." (A-13) Viewing Nichols' employment status as distinct from ACTWU's alleged retaliatory motive, the court remanded the case to the Circuit Court for trial on the issue of Nichols' employment status without regard to his claim of retaliatory motivation. (A-14, 15)

REASONS FOR GRANTING REVIEW

South Carolina's departure from the Court's labor preemption cases is so clear, so profound and so unsettling that the need for review and correction is compelling. We first demonstrate the clarity of the conflict between the decision below and Garmon. Next, we show how profound that conflict is by demonstrating that the decision below cannot be squared with this Court's more refined post-Garmon decisions. Finally, we demonstrate the broader importance of granting review in order to keep this area of our national labor policy stable.

A. The conflict is a clear one.

1. The conflict between the decision below and Garmon is plain and irreconcilable. This Court held in Garmon that "when it is clear or may fairly be assumed that the activities

which a State purports to regulate are protected by § 7 of the [Act], or constitute an unfair labor practice under § 8, due regard for the federal enactment requires that State jurisdiction must yield." 359 U.S. at 244. Although the court below recognized (i) that Nichols' claim for wages was founded upon "the threshold issue of whether he is in fact an employee of ACTWU" (A-5), (ii) that plaintiff "filed a charge with the NLRB claiming that ACTWU was in violation of the [Act] by virtue of its retaliatory refusal to hire him" (A-3) and (iii) that discrimination in hiring "is specifically defined as an unfair labor practice" (A-7) under the Act, it nonetheless refused to defer to the Board's primary jurisdiction as required by Garmon. The South Carolina court's departure from this Court's preemption rule could not be more

apparent or unequivocal. Garmon holds that the Board has primary jurisdiction over conduct which is arguably protected (such as plaintiff's running for office) or prohibited (such as ACTWU's refusal to hire). The South Carolina court, contrary to Garmon, held that when such cases arise under the state's wage payment law, one's employment status should always be determined by state court juries.

2. That the issue of plaintiff's employment status arises in the guise of a wage payment claim is of no special significance. This Court squarely held in Garmon that it does not matter "whether the States have acted through laws of broad general application rather than laws specifically directed toward the governance of industrial relations." 359 U.S. at 244. Nor does it matter that

South Carolina is not seeking to enjoin the alleged refusal to hire. State interference with the Act's unfair labor practice jurisdiction by a suit for damages under a wage payment law is no less a restraint than a more direct assault upon federal law. The Supremacy Clause forbids all manner of interposition. This Court recognized as much in Garmon:

> Such regulation can be as effectively exerted through an award of damages as through some form of preventive relief. The obligation to pay compensation can be, indeed is designed to be, a potent method of governing conduct and controlling policy. Even the States' salutary effort to redress private wrongs or grant compensation for past harm cannot be exerted to regulate activities that are potentially subject to the exclusive federal regulatory scheme.
>
> 359 U.S. at 247

3. The South Carolina court's expression that the employment status issue is not preempted "because this matter is a mere peripheral concern of the [Act] and touches interests deeply rooted in local feeling and responsibility" is an unsubstantiated and rote incantation of language in Garmon intended to demarcate generally the allocation of power in our democracy between federal and state authorities. The court below offers no basis for its conclusion that an individual's status as an "employee" is a "merely peripheral concern" of the Act. Nor does the court identify any "deeply rooted" local interest sufficient to avoid preemption.

Indeed, just the opposite of the South Carolina court's ipse dixit about matters of "peripheral concern" and "local interest" is true. On the issue

of refusals to hire, the federal interest is supreme and comprehensive, as Congress has vested primary jurisdiction in the Board to define the scope of unfair labor practices by employers (even when those employers happen to be labor unions). Application of state law to conduct which is arguably an unfair labor practice is precisely what this Court in Garmon said Congress sought to interdict:

> We have been concerned with conflict in its broadest sense; conflict with a complex and interrelated federal scheme of law, remedy and administration. Thus, judicial concern has necessarily focused on the nature of the activities which the States have sought to regulate, rather than on the method of regulation adopted. When the exercise of state power over a particular area of activity threatened interference with the clearly indicated policy of industrial relations, it has been judicially necessary to preclude the States from acting.
>
> 359 U.S. at 243

Likewise, reliance by the court below on the "local feeling and responsibility" exception to Garmon preemption is insubstantial. The court identified only a single local interest — that of "compelling employers to pay wages to their employees." (A-13) We readily agree that South Carolina has a legitimate interest in making sure that all employers pay their own employees what they are due as wages. It is Congress, however, not South Carolina, which is properly interested in whether an employer has committed an unfair labor practice by refusing to hire the individual as an "employee" in the first place. In this case the issue has always been whether ACTWU's refusal to hire Nichols was lawful.

This "threshold issue" (A-5) is one which is uniquely federal in character,

as this Court has recognized through five decades, NLRB v. Hearst Publications, 322 U.S. 111 (1944) (Definition of "employee"); NLRB v. Nat. Gas Utility Dist. of Hawkins County, 402 U.S. 600 (1971) (Definition of "employer"):

> Congress had in mind no such patchwork plan for securing freedom of employees' organization and of collective bargaining. . . . Nothing in the statute's background, history, terms or purposes indicates its scope is to be limited by such varying local conceptions, either statutory or judicial, or that it is to be administered in accordance with whatever different standards the respective states may see fit to adopt for the disposition of unrelated, local problems. Consequently, so far as the meaning of "employee" in this statute is concerned, "the federal law must prevail no matter what name is given to the interest or right by state law."
>
> NLRB v. Hearst Publications, supra, 322 U.S. at 123-24 (citations omitted).

South Carolina's interest in wage payment, therefore, is not directly implicated in ACTWU's refusal to hire Nichols. As we have pointed out, the federal interest is supreme in overseeing an employer's hiring practices, while state law is concerned with overseeing the payment of wages to individuals once they are hired. The "local interest" exception invoked by the court below, therefore, does not justify its interference with "federal legislation, administered by a national agency, intended to solve a national problem on a national scale." NLRB v. Hearst Publications, supra, 322 U.S. at 123.

4. The conflict between the decision below and Garmon stands out even more clearly when one considers the disparity between the federal and state remedies applicable to the same employer

conduct. Congress intended that victims of hiring refusals would file charges with the Board and ultimately obtain reinstatement and back pay under the Act. 29 U.S.C. § 160(c). In this case Nichols filed just such a charge, but dropped it before an initial determination by the Board's regional office. The decision below, however, would permit Nichols also to seek treble damages and counsel fees in state court under S.C. Code Ann. § 40-10-80(C) for the same unfair labor practice.

This Court faced an analogous situation in Wisconsin Dep't of Industry v. Gould, Inc., 475 U.S. 282 (1986), when it applied the Garmon preemption principle to a similar overlap in remedies. The Court, relying on Garmon, held that permitting a state remedy involving debarment of labor law violators would

"accentuate" the conflict with federal law because the scope of remedies for unfair labor practices is part of a comprehensive system of regulation established by Congress. 475 U.S. at 287.

So it is in this case. If the decision below is permitted to stand, individuals in South Carolina alleging refusals to hire involving arguable unfair labor practices could sidestep the Board's primary jurisdiction. The state courts, seemingly unbound by Garmon, would have free rein to impose treble damage liability on conduct which Congress sought to regulate exclusively through the Board's tailored remedial powers. The incursion here on federal law is thus immediate, and its effect on the delicate harmonic between state and national law is disturbing and merits

this Court's attention.

5. Finally, the South Carolina court's characterization of the employment status issue as distinct from a retaliatory refusal to hire does not avoid the impact of Garmon. Despite the instructions on remand that the Circuit Court may not consider evidence of any retaliation on ACTWU's part, the jury nonetheless must determine whether ACTWU will have to pay Nichols as an "employee" despite its undisputed refusal to hire him. We have shown that the determination of "employee" status in cases involving arguable unfair labor practices is a uniquely federal issue over which the Board has primary jurisdiction. NLRB v. Hearst Publications, supra.

Eliminating from the jury's purview evidence of ACTWU's motive does not thereby remove the hiring issue from the

range of arguable unfair labor practices. No such sleight of hand can obscure the central fact that Nichols cannot win in state court without proving to a jury that ACTWU's refusal to hire him was wrongful. Such a claim is, as Nichols himself admitted, the same one he made in his Board charge. [Rec. 54] Properly understood therefore, this case involves an unavoidable conflict with Garmon which should be reviewed and corrected.

The decision below, therefore, conflicts with Garmon in a way which defies harmonization or explanation on any recognized ground. Granting review is, therefore, necessary to vindicate the supremacy of federal law and maintain the integrity and vitality of the Garmon principle.

B. The conflict is a profound one.

The holding of the court below that "employee" status is henceforth to be determined by state court juries cannot be squared with a number of this Court's post-Garmon cases refining the primary jurisdiction doctrine. Three examples will suffice to demonstrate how profound the conflict is between the decision below and settled preemption principles.

1. In Amalg. Motor Coach Employees v. Lockridge, 403 U.S. 274 (1971), an employee's state contract claim for damages against his union was held preempted despite the employee's argument that his complaint charged only a simple violation of state law and not an unfair labor practice. This Court cut through the employee's "form over substance" argument:

> Assuredly the proposition that Lockridge's complaint was not subject to the exclusive jurisdiction of the NLRB because it charged a breach of contract rather than an unfair labor practice is not tenable. Preemption, as shown above, is designed to shield the system from conflicting regulation of conduct. It is the conduct being regulated, not the formal description of governing legal standards, that is the proper focus of concern.
>
> 403 U.S. at 292

In this case the South Carolina court failed to recognize that the issue of whether plaintiff was an employee of ACTWU was part and parcel of an unfair labor practice under the Act, just as was Lockridge's contract claim. Indeed, the South Carolina court's focus on the "purely internal union" exception noted in Lockridge (A-11) betrays its fundamental misunderstanding about ACTWU's role here as an employer, not a union.

2. Similarly, the decision below

conflicts with the rationale of Belknap v. Hale, Inc., 463 U.S. 491 (1983), where employees who claimed they were hired as permanent replacements during a strike sued the employer in state court for breach of contract and misrepresentation after being laid off to make room for strikers who returned to work as part of a settlement of unfair labor practice charges. This Court held that the replacements' state law claims were not preempted by Garmon because the controversy presented to the state court could not be fairly regarded as identical with the issue presented to the Board about the propriety of offering permanent employment to the replacements. 463 U.S. at 510-12.

The South Carolina court disregarded this "critical inquiry" into the identity of Nichols' Board charge and his state

court complaint even in the face of Nichols' admission that the Board charge was identical to the complaint he filed in this lawsuit. [Rec. 54] Belknap, Inc. v. Hale, supra, 463 U.S. at 510; see also Sears, Roebuck and Co. v. Carpenters, 436 U.S. 180, 197 (1978) (The "critical inquiry" is whether the controversy presented to the state court is identical to or different from that which could have been presented to the Board.) In contrast to Belknap and Sears, therefore, the fact that Nichols' Board charge is an admitted legal facsimile of his complaint in this action virtually guarantees the likelihood of "interference with the Board's function" which this Court has consistently protected against by means of the Garmon preemption rule.

3. Likewise, the decision below conflicts with this Court's holding in

Int. Longshoremen's Ass'n v. Davis, 476 U.S. 380 (1986), where a ship superintendent who was discharged by his employer after participating in union-related activities sued the union in state court for fraud and misrepresentation based on the union's assurances about obtaining reinstatement if he were fired for such activities. After the superintendent won a verdict, the union raised preemption as a defense for the first time, but failed to demonstrate that the Board could regard the superintendent as an "employee" under the Act. This Court held that the superintendent's common law claims were thus not preempted because of the union's failure to "carry the burden of showing at least an arguable case" as to his status as an employee. 476 U.S. at 396.

The present case involves no such evidentiary insufficiency. The court below simply refused to apply Garmon in the face of substantial evidence based on the ACTWU constitution, the Joint Board bylaws and ACTWU's past practices demonstrating (supra, pp. 4-6) that Nichols is at least arguably a statutory employee of the Joint Board and that ACTWU's refusal to hire him was consequently an arguable unfair labor practice. Sending this issue of employment status to a state court jury without first making a determination about its character as a colorable or arguable federal issue not only contra- venes what this Court said in Davis, but it also portends substantial unnecessary litigation over the threshold question of employment status in what was hitherto an area of relative calm in the labor

preemption field.

So profound is the departure from established preemption principles that the decision of the South Carolina Supreme Court is at odds even with the post-Garmon decisions of this Court marking the outer boundary of the Board's primary jurisdiction. Review by this Court is, therefore, essential to make sure that the state courts do not intrude on the national labor policy which Congress has crafted and which this Court has sought to protect in such thorough detail.

C. The conflict is a significant one.

The issue presented is one of special importance in the administration of our national labor policy. Determining an individual's employment status in the context of an arguable unfair labor practice is central to our national plan

for regulating employer-employee relations. Employers and workers alike need to know with clarity and predictability who is and who is not subject to the Board's unfair labor practice jurisdiction. South Carolina's decision to determine for itself which employers will be exposed to liability for conduct that is arguably an unfair labor practice and which individuals are deemed "employees" of such employers is a decision which has the highest capacity for mischief in an area of our economic life which begs for stability and uniformity.

Congress has recognized the importance of constancy in the administration of our national labor policy. The preamble to the Act premises the thoughtfully drawn legislative plan in part on the "stabilization of . . . working conditions" and the protection of

employee rights as a means for removing one of the "sources of industrial strife and unrest." 29 U.S.C. § 151. Mindful of this legislative policy, this Court held in Hearst Publications, that the definition of "employee" status must be regarded as a federal issue if "patchwork" regulation is to be avoided. 322 U.S. at 123. Similarly, in Garmon this Court stressed that responsibility for defining the reach of the Board's unfair labor practice jurisdiction is vested exclusively in the Board itself. 359 U.S. at 242-43.

Ignoring these fundamental precepts of national labor policy made binding on the states by the Supremacy Clause, the court below held that because employment status is "vital to all causes of action under" South Carolina's wage payment laws, henceforth an individual's

employment status would be determined by local judges and juries. Aside from the South Carolina court's jurisprudential misstep, its decision will spawn the kind of uncertainty and instability about unfair labor practices which Congress and this Court have sought to minimize.

The South Carolina decision, which effectively permits state juries to determine the reach of federal law, would thus destabilize what bench, bar and the public have plausibly assumed was an established element of labor relations jurisprudence. It has long been clear that the states could effectively establish minimum employment standards through wage payment laws or otherwise. E.g., Ft. Halifax Packing Co. v. Coyne, 482 U.S. 1 (1987). But until the decision below, neither South Carolina nor any state could define the reach of

the Act's unfair labor practice jurisdiction by permitting local juries to decide the employment status of an individual whose wage payment claim is also an arguable unfair labor practice.

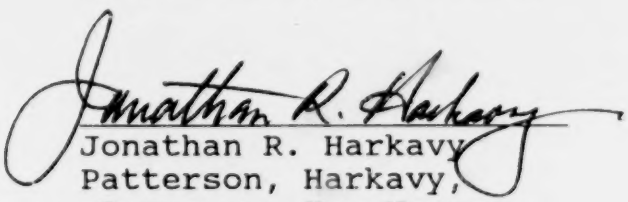
The truly disturbing importance of this case is that it is the proverbial "tip of the iceberg." Virtually all states have wage payment laws similar to South Carolina's. See generally, [4 and 4A, State Laws] Lab. Rel. Rep. (BNA) §§ 10-61 inclusive at subsections 6.25 and 6.75 (1991). If other state courts follow South Carolina's lead, employers — particularly multi-state ones — will face the kind of piecemeal regulation unintended by Congress and this Court alike. No matter how small or idiosyncratic this case may appear, therefore, its importance to the jurisprudence cannot be overstated. Review of the issue presented by this

case is thus necessary in order to reestablish the uniformity of regulation necessary to secure industrial peace.

CONCLUSION

For all of these reasons a writ of certiorari should issue to review the decision of the South Carolina Supreme Court.

Respectfully submitted,



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October 25, 1991

RECITATION UNDER RULE 29.4

28 U.S.C. §2403(b) may be applicable to this case, and counsel has therefore served the Attorney General of South Carolina pursuant to Supreme Court Rule 29.4(c).

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Edward C. Nichols, Petitioner

v.

Amalgamated Clothing and Textile Workers Union, AFL-CIO, CLC, Respondents

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Appeal from York County
Robert L. McFadden, Judge

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS

Opinion No. 23446
Heard June 14, 1991 - Filed Aug. 5, 1991

REVERSED AND REMANDED

Louis L. Lesesne, Jr. of North Carolina for Petitioner

Jonathan Harkavy of North Carolina and E. N. Zeigler, of Florence, for Respondents.

Toal, A.J.: This case comes before the Court on a writ of certiorari to the Court of Appeals. The action was brought under S.C. Code § 41-10-10 et seq. by an

elected manager of a local labor union who seeks to compel the payment of his salary by the parent national labor union. The Circuit Court held and the Court of Appeals affirmed that this action is preempted by the NLRA. We reverse and remand for trial.

STATEMENT OF FACTS

The ACTWU is a national labor organization. The Catawba Valley Joint Board is a subsidiary labor organization comprised of three local unions which are affiliated with ACTWU. On August 6, 1986, the plaintiff, Nichols, was elected as the manager of the local joint board. His opponent in the election was the admittedly preferred candidate of the ACTWU. The ACTWU has refused to hire or recognize Nichols as an employee or to pay him any compensation.

Nichols filed a charge with the NLRB claiming that ACTWU was in violation of the NLRA by virtue of its retaliatory refusal to hire him. The charge alleged that the ACTWU was retaliating against him for having run in opposition to their preferred candidate. Nichols ceased his pursuit of this charge on the advice of his attorney that he would not be able to gain relief through the NLRB. As an alternate means of recovery, Nichols instituted this action for wages under South Carolina Code § 41-10-10, et seq., claiming that he should be considered an employee of ACTWU by virtue of ACTWU's constitution and its past practice of treating local union managers as employees, and that he was thereby entitled to wages.

Nichols filed his complaint in this action on February 27, 1987. ACTWU had

the case removed to federal court. The federal court ruled that the case did not fall within the bounds of § 185(a) because Nichols' claim "hinges exclusively on an interpretation of the ACTWU constitution" and because the United States Supreme Court has expressly reserved ruling and thereby avoided holding that § 301 covers suits by union members on the union constitution against the union organization. See, United Ass'n of Journeymen v. Local 334, 452 U.S. 614, 627, 101 S.Ct. 2546, 2553, n. 16. The Federal Court remanded the case back to the circuit court on May 23, 1988.

On remand to state court, ACTWU moved for summary judgment on the grounds that Nichols' claims were preempted and legally insufficient. The circuit court held that the suit was preempted by the

NLRA, and granted summary judgment to ACTWU. Nichols appealed the circuit court decision to the Court of Appeals, which affirmed on the ground that, "Nichols' claim of retaliatory refusal to hire or pay, if proven, is arguably the kind of unfair labor practice subject to the exclusive jurisdiction of the National Labor Relations Board." Nichols seeks review by this court on a writ of certiorari.

LAW/ANALYSIS

In the case at bar, for Nichols to succeed in his cause of action for payment of wages, he must overcome the threshold issue of whether he is in fact an employee of ACTWU so as to be entitled to wages. This Court has previously decided in Kimbrell v. Jolog Sportswear, Inc., 239 S.C. 415, 123 S.E.2d 524 (1962); that an action for wages under

this state's statutory law is not preempted by the NLRA. The question that remains for our consideration here is whether the NLRA preempts the state court's consideration of whether Nichols is an employee of ACTWU by virtue of its past practices and its constitution.

Sections 7 and 8 of the NLRA explain the employee activities which are protected by the act and the employer conduct which is prohibited by the act. Section 7 provides,

> Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a

condition of employment as authorized in section 158(a)(3) of this title.

Section 8 defines the activities of employers and labor organizations which are considered to be unfair labor practices. The failure to pay wages is not listed among these activities. However, discrimination in regard to hiring is specifically defined as an unfair labor practice prohibited under the NLRA.

The United States Supreme Court has had occasion in several cases to develop an analysis for determining whether a state cause of action is preempted by the NLRA. In the watershed case of San Diego Building Trades Council v. Garmon, 359 U.S. 236, 79 S.Ct. 773, 3 L.Ed.2d 775 (1959), the Supreme Court established the doctrine that "state regulations and causes of action are presumptively

preempted if they concern conduct that is actually or arguably either prohibited or protected by the act." Belknap, Inc. v. Hale, 463 U.S. 491, 498, 103 S.Ct. 3172, 3177, 77 L.Ed.2d 798, 807 (1983) (citing Garmon).

However, the Garmon, doctrine also provided that the state regulation or cause of action may be sustained if the behavior to be regulated is behavior that is of "merely peripheral concern" to the federal law or "touches interests so deeply rooted in local feeling and responsibility" that the courts should not assume that Congress intended to preempt the application of state law. Garmon at 245, 79 S.Ct. at 779; Belknap at 498, 103 S.Ct. at 3177. "In such cases, the State's interest in controlling or remedying the effects of the conduct is balanced against both the interference

with the National Labor Relations Board's ability to adjudicate controversies committed to it by the Act, and the risk that the State will sanction conduct that the Act protects." Belknap at 498, 103 S.Ct. at 3177.

Belknap involved a contract dispute between an employer and the replacement employees which were hired to replace striking workers. The replacement employees claimed that the employer breached his contract with them by dismissing the replacement workers and reinstating the striking workers upon resolution of the dispute between the employer and the striking workers.

In Belknap, the Supreme Court considered both preemption doctrines[1] and

[1]A second preemption doctrine was set out in Machinists v. Wisconsin Employment Relations Comm'n., 427 U.S. 132, 96 S.Ct. 2548, 49 L.Ed.2d 396 (1976), which

concluded that, "the interests of the Board and the NLRA, on the one hand, and the interest of the State in providing a remedy to its citizens for breach of contract, on the other, are "discrete" concerns." Belknap at 512, 1023 S.Ct. at 3184. The Belknap opinion further stated, "we see no basis for holding that permitting the contract cause of action will conflict with the rights of either the strikers or the employer or would frustrate any policy or the federal labor laws." Ibid.

"proscribed state regulation and state-law causes of action concerning conduct that Congress intended to be unregulated," including "conduct that has to remain a part of the self-help remedies left to the combatants in labor disputes." Belknap at 499, 103 S.Ct. at 3177. We do not address this second preemption doctrine here as it has no applicability to the facts at bar. There is no contention, nor any support for such a contention, that the federal law intended to leave unregulated the conduct of employers failing to compensate their employees.

In the United States Supreme Court case of Motor Coach Employees v. Lockridge, 403 U.S. 274, 91 S.Ct. 1909, 29 L.Ed.2d 473 (1971), the Supreme Court explained that the NLRA does not preempt lawsuits "focused on purely internal union matters." Id. at 296, 91 S.Ct. at 1922. The Court referred to the case of International Association of Machinists v. Gonzales, 356 U.S. 617, 78 S.Ct. 923, 2 L.Ed.2d 1018 (1958); and explained that the NLRA did not preempt the state cause of action there because, "To assess the legality of his union's conduct toward Gonzales the California courts needed only to focus upon the union's constitution and by-laws." Lockridge at 296, 91 S.Ct. at 1923. Similarly, we find that in the case at bar, the circuit court need only to focus upon ACTWU's constitution, by-laws, and prior

practices. In fact, we specifically instruct that the circuit court should not consider any alleged retaliatory motivation on the part of the union nor any other conduct of the union outside of a breach of contract analysis as was allowed in Belknap and Gonzales.

We hold that Nichols' claim that he is an employee is a discrete concern from any claim that the union refused to hire him on a retaliatory ground. Nichols should be allowed to pursue his action under S.C. Code § 41-10-10 for payment of wages and any issue as to his status as an employee is not preempted by the NLRA because this matter is a mere peripheral concern of the NLRA and touches interests deeply rooted in local feeling and responsibility. We hold that the issue of employment status is vital to all causes of action under S.C. Code § 41-10-

10 et seq. and that Congress did not intend to preempt the application of this state law.

We hold that the State's interest in compelling employers to pay wages to their employees outweighs any interference with the NLRA or risk of sanctions being imposed upon conduct protected by the Act which could result from the State being allowed to adjudge whether or not a claimant under § 41-10-10 et seq. is an employee of the party for [sic] whom wages are claimed.

ACTWU offers several other grounds to support their motion for summary judgment. However, those grounds were not offered or considered at the hearing on the motion, in the order granting the motion, or even in the motion itself. They were introduced for the first time as additional sustaining grounds

submitted pursuant to Nichols' intent to appeal. Since an additional sustaining ground must be argued below to be available for consideration on appeal, these grounds need not be considered and the summary judgment may be reversed on the sole ground of NLRB preemption.

Nichols' complaint filed in state court does not assert a claim of retaliation, but merely relies on an interpretation of ACTWU's constitution and past practices. In fact, the essence of his complaint is a claim for wage payment and any determination of his status as an employee is an issue which is deeply rooted in local interest and not preempted by the NLRA. Therefore, we hold that the state court has jurisdiction over this claim and a trial is proper on the issue of failure to pay wages without consideration of any

allegations of a retaliatory refusal to hire. For these reasons, we **REVERSE** and **REMAND** for a trial in accordance with these instructions.

GREGORY, C.J., HARWELL, CHANDLER and FINNEY, J.J., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Edward C. Nichols, ... Appellant

v.

Amalgamated Clothing and
Textile Workers Union,
AFL-CIO, CLC, ... Respondent

Appeal from York County
Robert L. McFadden, Judge

Memorandum Opinion No. 90-MO-129
Heard Sep. 11, 1990 - Filed Sep. 24, 1990

AFFIRMED

Louis L. Lesesne Jr., of Gillespie, Lesesne & Connette, of Charlotte, N.C., for Appellant.

E. N. Zeigler, of Florence; and Jonathan Harkavy, of Smith, Patterson, Follin, Curtis, James & Harkavy, of Greensboro, N.C. for Respondent.

MEMORANDUM OPINION

PER CURIAM: The plaintiff, Nichols, sued the defendant, Union, for failure to

pay wages. The trial court granted summary judgment to Union, finding the claim was within the exclusive jurisdiction of the National Labor Relations Board. Nichols appeals; we affirm.

Nichols was elected as Board Manager of the local Joint Board. He contends the Union must pay his wages because he is an employee of the Union, arguing the Union employs and pays other similarly situated board managers. He contends further that the Union refuses to pay him because he defeated the Union's hand-picked candidate in the election of the Joint Board Manager. Thus, his claim is one of a retaliatory refusal to hire or pay.

The National Labor Relations Board has exclusive jurisdiction over the actions which "arguably" involve a violation of Sections 76 or 8 of the

Labor Management Relations Act, codified at 29 U.S.C. Sec's. 157 and 158, respectively. Breininger v. Sheet Metal Worker's International, U.S. , 110 S.Ct. 424 (1989). This "arguably involves" test for jurisdiction clearly seeks to promote and protect the uniformity of decisions in this federally preempted area of law.

Our research reveals no case on point, and neither party has cited a clearly controlling case. Although distinguishable on their facts, we find guidance in the following cases: Buscemi v. McDonnell Douglas Corp, 736 F.2d 1348 (9th Cir. 1984) (NLRB's exclusive jurisdiction includes retaliatory discharges for engaging in protected activities), cert. denied 465 U.S. 1029; Capitol City Lumber Co. v. N.L.R.B., 721 F.2d 546 (6th Cir. 1983) (NLRB has

jurisdiction to resolve contractual disputes when essential to the resolution of an unfair labor practice complaint); Mellot v. General Teamsters and Allied Workers, 534 F.Supp. 712 (D.Md. 1982) (NLRB has exclusive jurisdiction over actions involving the discharge of union employees for participation in the campaign of an opponent because such claims are arguably unfair labor practices); and Bebensee v. Ross Pierce Elec. Corp., 400 Mich. 233, 253 N.W.2d 63 (1977) (a state's interest in protecting workers from discriminatory treatment is adequately protected by federal law).

Nichols' claim of retaliatory refusal to hire or pay, if proven, is arguably the kind of unfair labor practice subject to the exclusive jurisdiction of the National Labor Relations Board. We express no opinion

on the merits of his claim.

Nichols also argues the general principle that management employees are not subject to the jurisdiction of the NLRB. We agree with this general principle but find it unavailing in this case. If Nichols is an employee of the Joint Board rather than the Union, then clearly he is a managerial employee not subject to the NLRB's jurisdiction. But if he is an employee of the Joint Board, then the Union does not owe him any wages. If, as Nichols contends, he is an employee of the Union, then it is at least arguable that he is not a managerial employee and, therefore, is subject to the NLRB's jurisdiction.

Accordingly, we affirm the judgment below.

AFFIRMED.

s/_____
s/_____
s/_____

STATE OF SOUTH CAROLINA
COUNTY OF YORK

IN THE COURT OF COMMON PLEAS
SIXTEENTH JUDICIAL CIRCUIT
C.A. NO. 88-CP-46-1264

Edward C. Nichols, Plaintiff, vs. Amalgamated Clothing and Textile Workers Union, AFL-CIO, CLC, Defendant.	**ORDER**

This matter came before the Court on Motion of Defendant Amalgamated Clothing and Textile Workers Union ("ACTWU") for Summary Judgment. This action involves a dispute between Plaintiff Nichols and ACTWU as to Nichols' employment status under the South Carolina wage payment law. Defendant contends that this Court lacks jurisdiction for the present because of provisions of the National Labor Relations Act ("NLRA"). For the reasons set forth below, Defendant's

Motion for Summary Judgment is granted.

The Federal Government has chosen to regulate labor law. When an activity may be subject to §7 or §8 of the NLRA, both state and federal courts must defer to the National Labor Relations Board ("NLRB"). San Diego Bldg. Trades Council v. Garmon, 359 U.S. 236 at 245 (1959).

Nichols filed and later abandoned a charge with the NLRB before instituting this state action. This charge alleged that ACTWU is Nichols' employer, and that as such, it has violated the NLRA by depriving Nichols of his wages "as a result of him (sic) having engaged in a protected concerted activity." Exhibit G to ACTWU's Motion for Summary Judgment. At his deposition, Nichols testified that his NLRB charge makes the same complaint he asserts in this lawsuit. Nichols' deposition, p. 82. Therefore, it is at

least "arguable" that this suit arises under §7 or §8 of the NLRA. Under these circumstances neither this Court nor the federal courts appear to have jurisdiction over this matter.

Summary Judgment is granted to ACTWU, and this suit is dismissed without prejudice. In the event that Nichols presents this suit to the NLRB again, and that body determines it does not have jurisdiction, Nichols may refile in this Court.

AND IT IS SO ORDERED.

/s/ Robert L. McFadden
Judge, Sixteenth Judicial Circuit

Rock Hill, South Carolina
June 9, 1989